

1 THE COURT: As a matter of fact, I'm going to give
2 you a minute to look at the opinion. I'm going to come back
3 out and let you make a pitch in fairness since this issue
4 didn't get totally teed up. We'll take a short recess.

5 (Recess from 3:00 p.m.; until 3:05 p.m.)

6 THE COURT: All right, tell me about this case?

7 MR. PATTON: The Supreme Court in footnote seven of
8 James, I'm sorry, I have your copy -- says burglary under
9 Florida law differs from generic burglary -- it extends not
10 just to entries of structures --

11 THE COURT: Say that last part again, will you?

12 MR. PATTON: It extends not just to entries of
13 structures, but also of conveyances. And then cites the
14 Florida statute. But because James, in accordance with what
15 appears to be the general practice in Florida, was specifically
16 charged with and convicted of attempted burglary of a dwelling,
17 you need not examine this point further. So they didn't need
18 to address the issue of a burglary statute or a burglary
19 conviction that dealt with the possibility that it was a
20 vehicle or something other than a dwelling in James.

21 THE COURT: Are you saying because it was only a
22 dwelling in James?

23 MR. PATTON: Right. Because the Indictment itself
24 said that it was a dwelling and, therefore, and the way that's
25 defined under Florida law, it was clear that it was a building.

1 And in James, as you'll recall, the question was, was an
2 attempted burglary, could an attempted burglary qualify as a
3 violent offense.

4 THE COURT: Yes.

5 MR. PATTON: So it wasn't a question that it was --
6 whether or not was a building that was at issue versus under
7 Florida law a conveyance or under this Ohio statute we're
8 dealing with, a truck, watercraft, aircraft, railroad car,
9 things of that nature. So the Supreme Court in James didn't
10 have to deal with taking the otherwise clause in the concept of
11 looking at the elements of the offense in deciding under the
12 elements of the offense does the offense involve conduct that
13 otherwise presents a serious risk of physical injury. And in
14 James they limit it to looking at the elements of the offense.
15 And they say, and this is on page -- I only have the Supreme
16 Court cite, 127 S.Ct. 1586 (2007), it's page 11 of the Westlaw
17 printout. Says "rather the proper inquiry is whether the
18 conduct encompassed by the elements of the offense in the
19 ordinary case presents a serious potential risk of injury to
20 another." Because they focus on the elements of the offense,
21 I'd have to disagree with your conclusion that under the Wilson
22 case when you say well technically under Wilson it's correct to
23 say that the government doesn't have to prove that presence or
24 likely presence. But it's not technically. It's that sets the
25 elements of the offense. And so even though you don't have to

1 find to a mathematical certainty that there is a serious
2 potential risk of injury, you do have to look just at the
3 elements of the offense, and say that based on those elements
4 is this a serious potential risk of injury. I think in our
5 case, because the Ohio statute deals with watercraft, all the
6 other items, that it does distinguish it from James. And James
7 also dealt with the curtilage issue. The defendant argued that
8 because the Florida statute allowed for a burglary conviction,
9 if you just entered the curtilage of a home, that it showed
10 well, there wasn't enough of an entry. What the Supreme Court
11 did is they looked at how did the state law interpret
12 curtilage. And they said under Florida law they required there
13 to be some type of enclosure for there to be curtilage. The
14 Supreme Court said that given that narrow definition by the
15 state courts of what the elements of the offense are, what
16 curtilage is, that because they interpreted it that narrowly,
17 there was still a serious potential risk of injury. But the
18 Ohio Supreme Court has not interpreted the burglary statute
19 narrowly to include cases where people are present or likely to
20 be present. They have interpreted it to distinguish it from
21 the aggravated burglary statute as just if it is an occupied
22 structure. They don't have to the state it's not an element of
23 the offense that a person be present or likely to be present,
24 and you cannot presume from the facts that it is an occupied
25 structure that someone is present or likely to be present.

1 THE COURT: All right, I have your point. Is there
2 something you wanted to say on the point, Ms. Sanner?

3 MS. SANNER: Yes, your Honor. Just calling the
4 court's attention to footnote seven in the James opinion, which
5 does cite Lane with approval. It's the government's position
6 that this still goes back to Lane and to the fact that
7 aggravated burglary may be different, it requires physical harm
8 or a deadly weapon or that a person is present. In this case
9 the victim, as a practical matter, wasn't home at the time that
10 the defendant burglarized it in California. He was not
11 physically present. What was burgled was his habitation. And
12 the government realized on both the language of the Indictment
13 and on Lane, which is cited by James, in which the Ohio
14 District Court, the federal court, the Sixth Circuit found that
15 burglary in Ohio presents a serious risk of the potential for
16 violence. All of the definitions of occupied structure --

17 THE COURT: Is it the government's view, since you
18 didn't cite it to me, that the James case is inapposite?

19 MS. SANNER: No -- I think it's helpful. I guess I
20 genuinely thought the issue was resolved by Lane. Because that
21 Ohio statute is specifically at issue. James deals with the
22 Florida burglary statute, I guess I narrowed down the focus to
23 that. I considered James to be the issue between James and the
24 Third Circuit decision in Bennett to be what would govern this
25 court's decision.

1 THE COURT: Well, since we're dealing with a
2 situation here where a man is either looking at 15 years or
3 looking at a substantially smaller amount of time, I'm going to
4 take all the time I need to figure this out, so I'm going to
5 take another recess. And if the prisoner here needs to be
6 taken up to the restroom or anybody else needs to go do that,
7 go do that. But we're going to take another look at it.

8 (Recess from 3:15 p.m.; until 3:35 p.m.)

9 THE COURT: In the brief discussion we had here
10 about James, I have not heard anything that has dissuaded me
11 from the correctness of my original conclusion. That having
12 been said, I'm going to do this. I'm going to give you until
13 the 15th to file a brief brief that addresses, and when I say
14 brief, you can make it however long you want to make it, that
15 addresses in some depth your position, as articulated briefly
16 here today, that James is genuinely inapposite and shouldn't
17 inform my decision here at all. Then, I'm going to give you
18 until the 20th to file a response to that. And then we will
19 reconvene for the conclusion of the sentence on the 28th at
20 1:30. All right, we're adjourned until then.

21

22 (Whereupon, at 3:30 p.m., the proceedings were
23 concluded.)

24

25

- - -

C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

A handwritten signature in dark ink, appearing to read "Ronald J. Bench", is written over a horizontal line.

Ronald J. Bench